IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MARION WOODMANSEE, Plaintiff, v. GARY CHRYSTLER, Defendant.	Case No. 2:05-CV-211 DB **REPORT AND RECOMMENDATION**

Before the court is a motion for summary judgment filed by pro se Plaintiff, Marion Woodmansee. (File Entry #11.) Having carefully reviewed the parties' pleadings, and having heard oral arguments in this matter, the court hereby submits this report and recommendation.

BACKGROUND

Because this case is before the court on Plaintiff's motion for summary judgment, the facts and any reasonable inferences drawn therefrom are presented in the light most favorable to Defendant, the nonmoving party. *See Sealock v. Colorado*, 218 F.3d 1205, 1207 (10th Cir. 2000); *Mann v. United States*, 204 F.3d 1012, 1016 (10th Cir. 2000).

At oral arguments, Plaintiff admitted to the court that he obtained a credit card from First National Bank of Omaha, N.A.

(hereafter referred to as "First National"), in 1988. (Official Transcript of Oral Arguments on Motion for Summary Judgment, August 4, 2005 (hereafter referred to as "8-4-05 Transcript"), at 12.) Plaintiff used that credit card to purchase items and made payments on the credit card. (8-4-05 Transcript, at 12.) Plaintiff did not pay the total balance on his credit card bill each month, so Plaintiff paid First National interest on his unpaid balance. (8-4-05 Transcript, at 12-13.)

According to Plaintiff's explanation given to the court at oral arguments, at a certain point Plaintiff's wife developed Alzheimer's Disease, resulting in substantial medical payments and nursing home care payments. (8-4-05 Transcript, at 13-14.) Then, following Plaintiff's wife's death, Plaintiff's wife's pension stopped being paid. (8-4-05 Transcript, at 14.) Plaintiff explained to the court that following these events, Plaintiff became unable to make the required credit card payments to First National, and so Plaintiff's payments to First National ceased. (8-4-05 Transcript, at 14.)

On October 8, 2004, Defendant, acting as counsel for First National, sent Plaintiff a written demand for payment of his past-due credit account balance of $19,928.68. (File Entry #13, at 1-2, Exhibit B.) Defendant's October 8 letter to Plaintiff explained that if Plaintiff did not contact Defendant's office within ten days from the date of the letter, Defendant would advise First National to commence legal action to recover the

amount due. Attached to Defendant's letter was a "Notice of Rights Pursuant to 15 USC Section 1692g." That notice explained that unless Plaintiff disputed the debt within 30 days from Plaintiff's receipt of the notice, Defendant's office would assume the debt was valid. The notice explained that if Plaintiff disputed the debt within 30 days, Defendant would suspend collection efforts and send Plaintiff verification of the debt.

Plaintiff did not respond to Defendant's letter within ten days. (File Entry #13, at 2.) As a result, pursuant to the instructions of Defendant's client First National, Defendant filed a collection Complaint in the Fourth Judicial District Court of Utah County, State of Utah, on November 15, 2004, well over thirty days after Defendant's October 8, 2004 letter to Plaintiff was sent. (File Entry #13, at 2, Exhibit A.)

Plaintiff then sent Defendant a letter dated December 1, 2004. (File Entry #13, at 2, Exhibit C.) The December 1 letter acknowledged Plaintiff's receipt of Defendant's October 8 letter. Plaintiff set forth various reasons in the December 1 letter of why he believed Defendant did not have a legal right to pursue the collection of Plaintiff's credit card debt.

After receiving Plaintiff's December 1 letter, Defendant sent Plaintiff a letter two days later, on December 3, 2004, notifying Plaintiff that his December 1 letter was being treated as a request for validation pursuant to the Fair Debt Collections

Practices Act (hereafter referred to as "FDCPA") and that he was appending to the letter documents validating Plaintiff's debt. (File Entry #13, at 2-3, Exhibit D.) However, according to Plaintiff's affidavit, Plaintiff is "not in receipt of any document proferred by either [Defendant] or [First National] that verifies that [Plaintiff] owed the alleged debt [Plaintiff] or [First National] were attempting to collect." (File Entry #11, at 6.)

Defendant explained at oral arguments that the state court proceedings continued, even after Plaintiff disputed the debt. (8-4-05 Transcript, at 10.) Defendant explained that the state court issued a summary judgment in Defendant's favor for a principal sum of $19,906.89. (8-4-05 Transcript, at 10.) Plaintiff did not attempt to contradict this statement.

Plaintiff filed his complaint in this case on March 10, 2005, and the case was assigned to United States District Judge Dee Benson. (File Entry #1.) Defendant filed his answer on March 21, 2005. (File Entry #4.) Plaintiff then filed a reply to Defendant's answer on April 4, 2005, and a supplemental reply brief on April 20, 2005. (File Entries #6, 9.)

On June 14, 2005, Plaintiff filed a motion for summary judgment and a statement of uncontroverted facts and conclusions of law in support of his motion. (File Entries #10, 11.) Defendant filed a memorandum in opposition to the motion for summary judgment, along with Defendant's affidavit, on June 16,

2005. (File Entries #12, 13.) Plaintiff then filed a reply to Defendant's memorandum in opposition on June 27, 2005. (File Entry #15.)

On June 20, 2005, Judge Benson referred the case to United States Magistrate Judge Samuel Alba pursuant to 28 U.S.C. § 636(b)(1)(B). Judge Alba held a hearing on the motion for summary judgment on August 4, 2005, during which both pro se parties presented oral arguments. (File Entry #17; 8-4-05 Transcript.)

ANALYSIS

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998). Unsupported conclusory allegations, however, do not create an issue of fact. *See Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir.), *cert. denied*, 125 S. Ct. 47 (2004).

A party moving for summary judgment bears the burden of showing that no genuine issue as to any material fact exists,

"and for these purposes the [evidence] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam) ("On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."); *Sealock*, 218 F.3d at 1207, 1209. The moving party may do so by identifying portions of the record which demonstrate no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its initial responsibility of informing the court of the basis for its motion, the nonmoving party must then sufficiently show "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. If the nonmoving party fails to meet this burden, the moving party is entitled to summary judgment "because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Id. at 323; *see also Simms v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999), *cert. denied*, 528 U.S. 815 (1999).

Because both Plaintiff and Defendant are acting pro se, the court construes their pleadings liberally. *See Cannon v. Mills*,

383 F.3d 1152, 1160 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1664 (2005).

Plaintiff brought this case against Defendant alleging that Defendant violated the FDCPA. Plaintiff appears to make seven main arguments to support his motion for summary judgment. First, Plaintiff appears to argue that Defendant either phoned Plaintiff or had others phone Plaintiff to harass Plaintiff, in violation of the FDCPA. *See* 15 U.S.C. § 1692c (2005). This argument is not supported by any sworn statement, but instead is presented as a conclusory allegation. Furthermore, Defendant's affidavit contradicts this argument. Defendant stated in his sworn affidavit that he "never contacted Plaintiff or his residence by any means other than written communication." (File Entry #13, at 3.) Because Plaintiff has not properly supported this argument, and because Defendant's affidavit directly refutes this argument, Plaintiff has failed to properly support this argument, and the court rejects it.

Plaintiff's second argument is that Defendant was required to cease his collection of the debt once Plaintiff disputed the debt. The FDCPA states that a debt collector must provide the debtor, either with the initial communication to the debtor or within five days of the initial communication, a written notice containing the amount of the debt; the name of the creditor; a statement that if the debtor does not dispute the validity of the debt within thirty days the debt would be presumed valid; a

statement that if the debtor does dispute the debt within the thirty-day period, the debt collector would send the debtor validation of the debt; and a statement that, upon the debtor's request within the thirty-day period, the debt collector would provide the debtor with the name and address of the original creditor if it differed from the current creditor. *See* 15 U.S.C. § 1692g(a) (2005). Defendant provided all of this information to Plaintiff with his December 3, 2004 letter, his first communication with Plaintiff. (File Entry #13, at 2-3, Exhibit D.) The FDCPA also provides the following:

> If the consumer notifies the debt collector in writing *within the thirty-day period* described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, *until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.*

15 U.S.C. § 1692g(b) (2005) (emphasis added). Plaintiff's argument that Defendant had to cease collection of the debt once Plaintiff disputed the debt is thus simply a misreading or misapprehension of the statute. Under the statute, if the debtor disputes the debt in writing within the thirty days of receiving the notice of the debt and the debtor's rights, a debt collector

can resume collection of the debt once the debt collector sends verification of the debt to the debtor.

Thus, based on the statute's plain language, Plaintiff's second argument fails for two reasons. First, under section 1692g(b), to trigger the debt collector's obligation to send validation of the debt, the debtor is required to dispute the debt within thirty days of receiving the debt collector's official notice of the debt. However, in this case, Plaintiff did not challenge the debt until after the thirty day period was over. Defendant sent Plaintiff the original letter demanding payment accompanied by the required notice of Plaintiff's rights pursuant to 15 U.S.C. section 1692g, on October 8, 2004. However, Plaintiff did not respond to Defendant's letter and notice until December 1, 2004, well outside of the required thirty day period. As a result, because Plaintiff failed to respond to Defendant's letter within the required thirty day period, Plaintiff failed to trigger Defendant's duty to validate the debt. Defendant was thus allowed to presume the debt was valid, and, as a result, Plaintiff's second argument fails.

The second reason Plaintiff's second argument fails is that, in presenting his argument to the court, Plaintiff appears to have created a genuine issue of material fact. As discussed in the background section above, Plaintiff declared in his affidavit that he is "not in receipt of any document proferred by either [Defendant] or [First National] that verifies that [Plaintiff]

owed the alleged debt [Plaintiff] or [First National] were attempting to collect." (File Entry #11, at 6.) Thus, Plaintiff's affidavit appears to say that he never received the validation of the debt Plaintiff enclosed with his December 3 letter. The court is somewhat puzzled by this sworn statement because of information Plaintiff included in his response to Defendant's December 3 letter. On December 7, 2004, Plaintiff sent Defendant another letter, in which Plaintiff referred to the following various documents sent by Defendant to Plaintiff: an affidavit, copies of checks, and copies of monthly statements. (File Entry #13, Exhibit E.) These documents referred to by Plaintiff in his December 7 letter are the very same documents Defendant sent Plaintiff with his December 3 letter validating the debt. In his December 7 letter, Plaintiff referred to these documents in terms of his argument that Plaintiff is required to present Plaintiff with the original, not a copy, of the credit card agreement. Thus, because Plaintiff specifically referred to these documents in his December 7 letter, it is possible that Plaintiff's statement in his affidavit simply means that, in Plaintiff's opinion, those documents did not properly validate the debt, rather than that Plaintiff never received the documents Defendant appended to his December 3 letter to validate the debt. However, because this is a motion for summary judgment, the court is not allowed to resolve this issue of material fact. Instead, the court must view the evidence in the light most favorable to

Defendant, the opposing party. Taking Plaintiff's statement in his affidavit to mean that he did not receive the validation documents places this material fact in genuine dispute. Thus, such a reading not only is reasonable, but it also and is most favorable to Defendant, as it results in the failure of Plaintiff's summary judgment. As a result, Plaintiff's second argument also fails because Plaintiff has not met his burden to show the court that no genuine issue of material fact exists.

Plaintiff's third argument is that in order for Defendant to properly verify the debt, Defendant was required to present Plaintiff with the original credit card agreement containing Plaintiff's promise to pay. As explained above, Plaintiff did not dispute the debt within the required thirty day period to trigger Defendant's duty to verify the debt; thus, Defendant was allowed to presume the debt was valid. As a result, because Defendant was able to presume the debt was valid, Defendant was not required to provide verification of Plaintiff's debt, the court need not address Plaintiff's verification argument, and the court therefore rejects Plaintiff's third argument.

Nevertheless, even though the court need not address Plaintiff's argument that Defendant was required to submit the original credit card agreement, because the case is continuing and Plaintiff may raise the argument again, the court has opted to address Plaintiff's argument here. Plaintiff supports his argument with *In re. Maxwell*, 281 B.R. 101 (Bkrtcy. D. Mass.

2002), which held that the FDCPA applied to the company that serviced a residential mortgage loan, and that the company violated the FDCPA by demanding amounts for which it had no documentation support because it did not have a copy of the mortgage note or a written history of the borrower's payments. *See id.* at 117-120. Plaintiff also supports his argument with cases holding that foreclosure on a mortgage requires that the original note be presented. These cases are neither binding on this court nor do they apply to the current case. The cases cited by Plaintiff are either state cases or cases from other circuits, and are therefore not binding on this court. Furthermore, they are not even persuasive because their facts greatly distinguish them from the instant case. This case does not involve the foreclosure of real property, but instead involves the collection of credit card debt. Thus, the cases cited by Plaintiff regarding the foreclosure of real property are inapplicable. Furthermore, contrary to what Plaintiff suggests, the *Maxwell* case does not require a creditor to present the original credit card agreement to the debtor; instead it requires a creditor to have sufficient documentation to support the demands the creditor makes of the debtor.

In addition, the court has conducted its own research on this issue and has found no applicable cases or statutes that support Plaintiff's position. Rather, the documentation appended to Defendant's December 3 letter adequately validates Plaintiff's

debt. Furthermore, that documentation even appears to comply with the requirements set forth in the material appended by Plaintiff to his pleadings; namely, in addition to a copy of the cardholder agreement Plaintiff consented to when he began using his credit card, Defendant submitted an affidavit of a manager at First National regarding the amount of principal owed by Plaintiff on his account, copies of checks written by Plaintiff and sent to First National to be applied to his credit card account, and copies of nine monthly statements sent to Plaintiff by First National. (*See* File Entry #10, Plaintiff's Motion for Summary Judgment, Exhibit 1, at 2 (explaining that validation requires presentment of the account and general ledger statement and not just a copy of the consumer credit contract)).

Plaintiff's fourth argument appears to be that First National assigned the debt to Defendant, and that the law does not allow a credit card debt to be assigned. The court rejects this argument because Plaintiff has made no showing that First National assigned its debt to Defendant. On the contrary, all documentation and statements presented to the court support that Defendant was acting as an attorney for First National. Simply because Defendant is subject to the requirements of the FDCPA does not mean that First National assigned the debt to Defendant.

Plaintiff's fifth argument is that because First National has already written off Plaintiff's credit card debt, it should not be allowed to collect on that debt now. Plaintiff's argument

appears to be that First National has no legal claim against him because the debt was already written off and, according to Plaintiff, First National has probably already collected on the debt from its insurance policy. However, Plaintiff is suing Defendant, the attorney who represented First National in collecting on Plaintiff's credit card debt, by alleging that Defendant violated the FDCPA. Plaintiff has not explained how First National writing off Plaintiff's debt is relevant to this case brought against Defendant, or how this supposed action of First National supports Plaintiff's allegations that Defendant violated the FDCPA. As a result, the court refuses to further examine this argument and therefore rejects it.

Sixth, Plaintiff also argues that the state judgment obtained against Plaintiff in favor of First National is void because the state judge lacked jurisdiction. Again, as with Plaintiff's fifth argument, Plaintiff has failed to explain how this argument is relevant to his case against Defendant. Furthermore, other than by making conclusory allegations and declarations regarding void judgments, Defendant has not shown why the state court judgment is void.[1] Therefore the court also rejects Plaintiff's sixth argument.

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[1]In addition, the court notes that if Plaintiff desires to challenge the state court judgment, he must do so by appealing in the proper forum, in the state court system, rather than by filing a case in federal court.

Finally, Plaintiff argues repeatedly that Defendant lacked "jurisdiction" because he was a "third party debt collector." The court has been unable to discern what Plaintiff is trying to argue and has concluded that this argument is based on a misunderstanding of the law. The court notes for Plaintiff's benefit that only courts have jurisdiction; litigants do not. Therefore, this argument makes no sense and the court declines to further address it.

RECOMMENDATION

Based on the above analysis, **IT IS HEREBY RECOMMENDED** that Plaintiff's motion for summary judgment (File Entry #11) be **DENIED.**

Copies of the foregoing report and recommendation are being mailed to the parties who are hereby notified of their right to object to the same. The parties are further notified that they must file any objections to the report and recommendation, with the clerk of the district court, pursuant to 28 U.S.C. § 636(b), within ten (10) days after receiving it. *See* 28 U.S.C. §

636(b)(1) (2005). Failure to file objections may constitute a waiver of those objections on subsequent appellate review.

DATED this 1st day of November, 2005.

BY THE COURT:

Samuel Alba
United States Chief Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

MARION WOODMANSEE,)

Plaintiff,)

vs.) CASE NO. 2:05-CV-211DB

GARY CHRYSTLER,)

Defendant.)

_____)

BEFORE THE HONORABLE SAMUEL ALBA

August 4, 2005

Motion for Summary Judgment

A P P E A R A N C E S

For Plaintiff:

MARION WOODMANSEE
587 South 300 East
Payson, Utah 84651

For Defendant:

GARY L. CHRYSTLER
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August 4, 2005 10:00 a.m.

P R O C E E D I N G S

THE COURT: Let's go on the record in the matter that is currently before me. It is in the matter of Marion Woodmansee versus Gary Chrystler.

MR. CHRYSTLER: Chrystler, Your Honor.

THE COURT: Okay. This is a case that is assigned to Judge Benson. It is before me on an order of reference from him so that I can review it and prepare a report and recommendation on the motion for summary judgment, wherein I give the judge my advice in terms of what he ought to do with the case.

The way this works is as follows: The motion is filed, the order of reference comes in, I hear the argument of the parties, and I will prepare a report and recommendation. I will give it to the judge and the parties will have ten days in which to file any objections that you may have to my report and recommendation. And then the judge can either adopt it in whole, adopt a portion of it only, or reject it totally. It is entirely up to him. He reviews it de novo. That means that he reviews the evidence all together again in making that determination.

Now, who is here? Why don't you note your appearances today for purposes of these proceedings. Who do we

have here?

MR. WOODMANSEE: Marion Woodmansee, Your Honor.

THE COURT: And you're the plaintiff in this case?

MR. WOODMANSEE: Yes.

THE COURT: All right.

MR. CHRYSTLER: Gary Chrystler, the defendant.

THE COURT: Thank you.

Let me tell you what I have done in preparation for the hearing here this morning. Mr. Woodmansee, I have reviewed your motion for summary judgment. I have reviewed the brief in support thereof. You have also appended to it certain things that you had referenced in your materials, and I have reviewed that information. I have a plaintiff's statement of uncontroverted facts and conclusions of law in support of your motion for summary judgment. I have reviewed that.

I have Mr. Chrystler's memorandum in opposition to the motion for summary judgment, his affidavit as well, along with a number of exhibits that he references in the affidavit. I have had an opportunity to go through those. And then there is a reply that the plaintiff has filed in this case to the materials submitted by the defendant in this case. To me it looks to be going over the same information that was included in the original material. That reply also includes certain attachments that I have had an opportunity to go through and review as well. They seem to be from the Federal Register.

So with that in mind, Mr. Woodmansee, anything else that you wish to add at this time concerning your motion?

MR. WOODMANSEE: Well, yes, Your Honor. I would like to make a summary judgment court statement.

THE COURT: Okay.

MR. WOODMANSEE: Your Honor, I have legal evidence, not opinion, proving that the defendant has no viable defense against the plaintiff. The defendant has not and cannot provide any proof that he has a legal claim against the plaintiff.

THE COURT: Well, let me stop you there for a minute. Okay.

MR. WOODMANSEE: Sure.

THE COURT: It is not that he has a legal claim against you, it is that he is acting on behalf of someone who has a legal claim against you. That is how lawyers practice. Most of the time they don't have an action against the individuals. It is part of their responsibility to represent businesses, entities, corporations, banks, financial institutions, in bringing actions when they are trying to collect certain debts that are owed to those institutions.

So with that in mind, continue.

MR. WOODMANSEE: Well, without the legal evidence of a valid legal claim against the plaintiff he is acting as a thief trying to steal money from the plaintiff.

THE COURT: See, I won't stand for that, Mr. Woodmansee. I won't stand for any characterization of individuals in front of me like that. This is not the place to do that.

Number one, you submitted certain documents to him after he filed the action in state court, or prior to that, I guess the notice went to you. He took that to mean that you wanted certain evidence of the indebtedness. He submitted documents to show that. You have taken the position that that does not apply to you.

What else do you want to tell me? But I don't want you to characterize individuals in that manner. This is not the time nor the place to do so.

MR. WOODMANSEE: Yes, Your Honor. We are dealing with the Fair Debt Collection Practices Act.

THE COURT: I understand that and I have that in front of me. What specifically about that is it that you are relying on?

MR. WOODMANSEE: 15 U.S.C. Section 1692 clearly states that anyone but the original lender is a third party debt collector and is subject to Section 1692.

THE COURT: That is part of the statute. That is not what all of the statute says.

MR. WOODMANSEE: The defendant is not the original lender and is subject to Section 1692 that states, when a

debtor states that the debt is in dispute, the debt collector must cease and desist any collection activity, or the debt collector is in violation of Section 1692.

THE COURT: See, Mr. Woodmansee, that is the beauty of people who try to represent themselves. You pick and choose specific things from the statute without reading it totally. Okay. That concerns me.

Go ahead.

MR. WOODMANSEE: Since the defendant has refused to cease and desist, the defendant is in clear violation of Section 1692. The U.S. Supreme Court in the Heintz versus Jenkins case ruled that debt collector attorneys have no jurisdiction under 1692. I have a copy of that Heintz versus Jenkins case. I think you may have one as well, but if not I have another one.

THE COURT: You cited it in your materials. Remember what I started this whole thing with this morning? I have reviewed the materials. Is there something new that you want to add at this time?

MR. WOODMANSEE: I believe not, Your Honor. We'll see what the defendant has to offer. I may want a rebuttal.

THE COURT: That will be fine.

Let's listen to what he has to say, and then I'll give you an opportunity to reply to him.

MR. WOODMANSEE: Thank you, Your Honor.

THE COURT: Okay. Counsel?

MR. CHRYSTLER: Thank you, Your Honor.

Your Honor, as I have received the various documents and pleadings from the plaintiff, it has been somewhat difficult for me to determine what his cause of action is and what his claim is. The best that I can figure out, and I may be incorrect, but it seems to me like he is claiming first of all that he never received the debt validation that I sent him. I do have a letter addressed to me, and the first sentence says, this is in response to your letter of December 3rd, 2004.

THE COURT: For purposes of the record, that letter of December the 3rd of 2004 is the one that appended to it all of the materials that you had submitted to him; is that correct?

MR. CHRYSTLER: That is correct.

THE COURT: That is one of the exhibits that you included in your response?

MR. CHRYSTLER: That is correct. That is the debt validation letter. That letter enumerated the attachments. Nowhere in this letter from -- this December 7th letter that I'm referring to now is signed by Mr. Woodmansee. Nowhere in this letter does he indicate that he didn't receive the attachments to that letter. Therefore, I think we need to presume that he did. He swears under oath that he never received the debt validation. That concerns me.

The other issue, I suppose, and I may be reading this into what he has presented in document form, but it seems like he is claiming that once a debtor puts into dispute a debt that a third party debt collector is attempting to collect, then that third party debt collector can't proceed. That is not the law, but that is the only thing that I can figure out that he is --

THE COURT: When you say that that is not the law, what specifically are you referring to?

MR. CHRYSTLER: The Fair Debt Collection Practices Act says if the debtor disputes the debt, all collection activities must cease until such time as validation has been sent.

THE COURT: Once validation is sent, then further debt collection activity can continue?

MR. CHRYSTLER: That is my understanding.

THE COURT: Including the filing of a lawsuit? That is your reading of what the statute is?

MR. CHRYSTLER: Well, I'm not sure that that is even relevant, because if you look at the file, Mr. Woodmansee never put the debt in dispute until after the complaint was filed. But we did cease and tolled the running of the summons until such time as we provided that debt validation, and then there was no further response -- well, there was a response from Mr. Woodmansee that sort of, I guess, reiterated what he had

already sent, and then we proceeded.

We have now obtained a judgment by summary judgment in the state court. We just did that a few weeks ago. That is where it stands.

THE COURT: So the proceedings in state court continued; is that correct?

MR. CHRYSTLER: It did.

THE COURT: Up to judgment?

MR. CHRYSTLER: After we provided the debt validation.

THE COURT: Have any efforts been made at all to collect on that judgment?

MR. CHRYSTLER: No.

THE COURT: Is the judgment in the amount that you originally claimed, in excess of $19,000?

MR. CHRYSTLER: The judgment was for a principal sum of $19,906.89. That is the amount alleged in the complaint and in the collection act that was originally sent to Mr. Woodmansee.

THE COURT: Thank you. I understand your position.

Mr. Woodmansee, anything in reply?

MR. WOODMANSEE: Yes, Your Honor.

As far as the judgment is concerned, that is a void judgment because Judge Scofield acted without jurisdiction, and he will have an opportunity to defend himself against that

charge.

There are several situations here which I would like to address, if you don't mind. The one major thing to start with is all banks, including the First National Bank of Omaha, are governed by the U.S. Comptroller of the Currency. There are no exceptions. In June of 2000 the Comptroller of the Currency issued a June 2000 bulletin requiring all banks to write off all unsecured customer debt that is more than 180 days in arrears.

THE COURT: Let me stop you there for a moment, Mr. Woodmansee. What relevance does that have to the issue before the Court? How is that relevant?

MR. WOODMANSEE: Here is the credit alert notice from the credit reporting agency, Trans Union Corporation. The debt was written off and the credit reporting agency is notified by the bank in April of this year that that bad debt charge-off in the amount of 22,134 took place. It certainly appears at this stage of the game that they are trying to collect again, but here is the other --

THE COURT: Well, hang on for a minute. I had a question for you just a moment ago. How is that relevant to the proceedings here?

MR. WOODMANSEE: The debt they are trying to collect now has been written off.

THE COURT: Does that mean that the bank is just out

that amount of money?

Well, let me back up and let me just ask a couple of questions here and maybe you can answer those to my satisfaction. Number one, did there come a time sometime in the past where you obtained a credit card from that bank?

MR. WOODMANSEE: In 1988, 16 years ago I paid them interest for 16 years.

THE COURT: I see. Did you use that credit card during that period of time?

MR. WOODMANSEE: Yes, Your Honor.

THE COURT: Did you make payments on that credit card during that period of time as well?

MR. WOODMANSEE: We had a mutual agreement.

THE COURT: What was that agreement?

MR. WOODMANSEE: That I could use those funds if I paid them a substantial amount of interest, which I did. The situation --

THE COURT: You didn't have to pay them any interest if you made the payments on a regular basis and paid it off in full every month. Wasn't that what the agreement said? It is only if you didn't make the full payment that interest would be added to it? Is that correct, or am I incorrect?

MR. WOODMANSEE: No, you are correct.

THE COURT: Okay. In fact, the total payments were not made for the use of the credit card on a monthly basis; is

that correct?

MR. WOODMANSEE: Please repeat that.

THE COURT: You would get a statement at the end of the month. You would make a payment but it wasn't for the full amount of what you had used the credit card for so, therefore, interest started being accrued; is that correct?

MR. WOODMANSEE: Yes.

THE COURT: To the point where it exceeded $19,000?

MR. WOODMANSEE: Yes.

THE COURT: Is that correct?

MR. WOODMANSEE: Well, the minimum payments were made each month.

THE COURT: Just the minimum payments?

MR. WOODMANSEE: Yes.

THE COURT: But you were using it in excess of what the minimum amount was?

MR. WOODMANSEE: Yes.

THE COURT: And you continued to use that for a period of time?

MR. WOODMANSEE: Yes, Your Honor. Could I explain my situation to you?

THE COURT: Certainly.

MR. WOODMANSEE: I maintained perfect credit for 80 years. Upon my wife incurring Alzheimer's Disease, we had substantial medical payments and nursing home care payments.

THE COURT: Did you use the card for some of that, medication, things like that?

MR. WOODMANSEE: Well, I used all of my funds.

THE COURT: I see.

MR. WOODMANSEE: When she finally passed on, after five years of those expenses, I didn't have anything left.

More of a problem was the fact that we were on pensions and when she passed away, so did half of the money income. I probably should have taken bankruptcy at that time, but I was trying to protect my credit rating and also establish other sources of income to where I could pay off the credit cards. Maybe I was too honest for my own good.

In any case, for the next 26 months, which they are outlined there, I paid them an extra $3,800 in interest and I probably would have been better off if I would have taken bankruptcy to start with. But it turns out that nobody hires you at that age, and you have to have an in-home business or something, which I tried to establish unsuccessfully. So at the end of July, 2004, there was no way that I could continue making the payments. So actually this amounted to bankruptcy in another form.

But at this stage of the game I don't even have enough monthly income to pay for both food and medications.

THE COURT: That is when you made the decision to discontinue payment?

MR. WOODMANSEE: I had no choice.

THE COURT: Okay.

MR. WOODMANSEE: I had no choice. They were circumstances beyond my control. Of course at that time my perfect credit rating of 80 years went down the drain along with it. I was probably too honest in trying to get new income to continue paying them and save my credit, but I was unsuccessful.

THE COURT: I understand.

Anything more, Mr. Woodmansee, that I should know?

MR. WOODMANSEE: Well, actually there are a couple of other items. There are consumer protection laws, one having to do with that credit card agreements cannot be assigned to a third party, and there are several cases where the appellate courts have repeatedly ruled that a bank lender cannot foreclose on any debt without presenting the original promise to pay, the credit card agreement. If the bank cannot present the original promise to pay, the credit card agreement, then it is if it does not exist. So saith the appellate court cases.

THE COURT: This material is material that you have included in your papers and I have reviewed it.

MR. WOODMANSEE: Thank you.

THE COURT: Anything more?

MR. WOODMANSEE: Well, basically this thing is that they have not provided the original credit card agreement. It

has been written off. I have no means of paying. If they didn't use their insurance, which I think they should have, and they surely had bankruptcy insurance, especially on unsecured debts. Even on secured debts, banks on mortgages demand that the homeowner carry insurance. I can't imagine that they wouldn't carry insurance. And the fact it was written off opened up the window which gave them a chance to collect from their insurance company. If it is collected on an insurance policy, the bank would be guilty of criminal fraud, trying to collect twice on the same debt.

THE COURT: That presupposes that the bank would end up with that. They may have to reimburse the insurance company if in fact they got any money from that. That is normally the way it works, Mr. Woodmansee.

MR. WOODMANSEE: The bottom line is that the debt had to be written off and was written off. As a result, the defendant has no legal claim against the plaintiff.

THE COURT: I understand your position. Thank you very much.

What I am going to do is I am going to prepare a report and recommendation to Judge Benson in this case. It will be mailed out to the parties. We have an address for you, Mr. Woodmansee, of 587 South 300 East, Payson, Utah, 84651.

Is that a correct address?

MR. WOODMANSEE: Yes, Your Honor.

THE COURT: Counsel, we have 363 North University Avenue, Suite 103, Provo, Utah, 84603, Post Office Box 1045.

MR. CHRYSTLER: That is correct, Your Honor.

THE COURT: Once that report and recommendation is prepared, it will be mailed to you and you will have ten days in which to file any objections that you may have to it. Don't let that go by, because that is a jurisdictional requirement. If you don't file it within ten days, then it won't be considered by the judge, so you need to make sure.

He, as I told you earlier, will either adopt the report and recommendation, adopt only portions of it, or reject it totally. You may file those objections in writing with Judge Benson in this Court, and then he may even want to have another hearing, and I don't know whether he will or not, or just rules on the papers. Then he will rule on that.

Now, this is a motion for summary judgment, your motion. The standard under Rule 56 is quite clear. If there are factual disputes still out there, then summary judgment is not appropriate. Okay. That is the usual standard. So we'll have to look at it and then you'll get my report and recommendation.

Any questions?

MR. WOODMANSEE: Do you have a copy of the credit alert notice?

THE COURT: If you attached it as in exhibit, I do.

MR. WOODMANSEE: Do you have where it was written off?

THE COURT: I have that as an exhibit. I think you attached that.

MR. WOODMANSEE: I think you probably have all of the exhibits that we had there.

THE COURT: All right.

MR. WOODMANSEE: If not, I have a new set for you if you need them.

THE COURT: That is fine. I have them right now.

MR. WOODMANSEE: Okay.

THE COURT: Anything more?

MR. WOODMANSEE: No.

MR. CHRYSTLER: No, Your Honor.

THE COURT: We'll be in recess.

Thank you.

(Proceedings concluded.)

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, R. Edward Young, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on Aug. 4, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 1 to 18 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 13th day of Aug, 2005.

Ed Young, United States Court Reporter

ED YOUNG = COURT REPORTER = 247 U.S. COURTHOUSE
350 SOUTH MAIN STREET, SALT LAKE CITY, UTAH 84101-2180